1989

State of Utah v. Greg N. Oliver : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
GREG N. OLIVER,	:	Case No. 890625-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction for burglary, a second degree felony, in violation of Utah Code Ann. section 76-2-202, and theft, a third degree felony, in violation of Utah Code Ann. section 76-6-404, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Michael R. Murphy, Judge, presiding.

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STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court by Utah Code Ann. section 78-2a-3(2)(f) (jurisdiction over criminal convictions less than first degree felonies).

STATEMENT OF ISSUES

1. Was Mr. Oliver denied due process of law and/or effective assistance of counsel when the trial court denied trial counsel's motion for a continuance, despite the fact that trial counsel had done no preparation to try this case?

2. Should the theft charge have been reduced to a class A misdemeanor because the State failed to present evidence proving the value of the property in issue to be at least two hundred and fifty dollars?

STANDARD OF REVIEW

The trial court's denial of the motion to continue the trial is reviewed for a clear abuse of the trial court's discretion. State v. Moosman, 542 P.2d 1093 (Utah 1975).

Standards of appellate review of ineffective assistance of counsel claims are set forth in State v. Crestani, 771 P.2d 1085 (Utah Ct. App. 1989), as follows:

> To determine if the trial court correctly applied this [Strickland ineffective assistance] standard, a reviewing court
>
> > may engage in its own independent review of the district court's conclusion, because the issue of ineffective assistance of counsel presents a mixed question of law and fact. If a state court has rendered specific predicate factual findings, those findings should be presumed correct unless conditions exist which case those findings into doubt. The district court's findings of fact, however, are reviewable under the clearly erroneous standard.

Id. at 1089 (citation omitted).

The trial court's findings of fact relating to the value of the property are reversed if clearly in error. State v. Johnson, 771 P.2d 326, 327 (Utah App. 1989). The jury's verdict on this question is entitled to greater deference. State v. Johnson, 774 P.2d 1141 (Utah 1989).

STATUTES AND CONSTITUTIONAL PROVISIONS

The statutes and constitutional provisions to be relied on are contained in either Appendix 1 or the body of the brief.

STATEMENT OF THE CASE

Mr. Oliver was tried and convicted by a jury of burglary and theft after a trial on September 5 and 6 of 1989, and sentenced to the Utah State Prison for concurrent terms of zero to five and one to fifteen years, and ordered to pay restitution (R. 166-167).

STATEMENT OF FACTS

John H. Spielmans, former investigator and author of presentence reports for the Utah Department of Corrections, testified that on January 7, 1989, he and his son arrived home at about 2:30 in the afternoon (T. 18-22). He noticed that the door to the garage, which door was normally locked at all times, was open (T. 23). Mr. Spielmans went in the garage to investigate and noticed something move outside the window in the garage (T. 24). He saw a person ten to twelve feet away vaulting a chain link fence and continuing northward (T. 24). Mr. Spielmans indicated that the day was overcast, and that he was able to view the person vaulting the fence "for a very brief period" (T. 24). Mr. Spielmans began following the person but lost sight of him (T. 24).

Upon returning home, Mr. Spielmans saw that the front door was mangled, and his son informed him that someone had been inside the house (T. 25).

Mr. Spielmans called 911 on a cordless phone, as he walked out on his driveway, where a neighbor approached and pointed out a person pressed up against a wooden fence across the street (T. 26). Mr. Spielmans thought the person against the fence was the same

person he had seen vaulting the fence, noting the person's blond hair, navy watch cap, and Levi jacket (T. 27). After some hesitation, Mr. Spielmans headed toward the person, who moved southward (T. 28). The person was in Mr. Spielmans' clear view as the person moved toward his car and Mr. Spielmans chased him, and when Mr. Spielmans reached the rear bumper on the driver's side of the car, the person said to him, "It wasn't me, man." (T. 35-36). The person then got in his car and drove away (T. 36). When the person was speaking to Mr. Spielmans, Mr. Spielmans could see the left profile of the person's face (T. 37). Mr. Spielmans called 911 again, giving the license plate, description, and direction of travel of the vehicle he had just seen (T. 43).

When the officer from the Sheriff's office came to Mr. Spielmans' home, Mr. Spielmans determined that a watch, a ring, four one dollar bills, and four or five coins worth about seventy five cents each were missing (T. 43, 71). At that time, Mr. Spielmans estimated the value of the watch to be $125 and could not remember what value he had placed on the ring, indicating that the police report would contain the correct estimate on the value of the ring (T. 48-49). After an attempt to refresh his recollection by viewing the police report, Mr. Spielmans could not recall the value he placed on the ring, indicating that the police report was accurate, but that he personally could not recall (T. 50). Mr. Spielmans later discovered four or five Canadian dollars worth about seventy-five cents a piece were missing (T. 71).

When Mr. Spielmans checked the back of his home, he noted that one of the sliding door locks was out of place and that there were footprints in the snow heading northward (T. 51, 63).

The next day, a deputy sheriff came to Mr. Spielmans' door and showed him one photograph, and asked if the subject of the photograph was the person who had burglarized Mr. Spielmans' home (T. 52). Mr. Spielmans indicated that "it appeared to be." (T. 52).

A week later, Mr. Spielmans was in the sheriff's office, when they showed him a photo spread of six photos (T. 54). Mr. Spielmans selected one of the photos, the center one on the top row, indicating that that was the person he had seen vaulting his fence (T. 54, 61).

It appears that the photograph that Mr. Spielmans selected from the photo array was the exact same photo he was shown by Officer Matthews the week before (T. 228).

A stipulation was entered into the record, indicating that if a Detective Carr were called to the stand, he would testify that he showed the same photo spread to Mr. Spielmans on January 10 and that Mr. Spielmans selected the photo of Mr. Oliver (T. 127-128).

In April, Mr. Spielmans attended a lineup of six people, selecting a person as the one who had vaulted his fence (T. 57).

In court, Mr. Spielmans identified Mr. Oliver, "Gentleman in the ski sweater, the defendant[']s table," as the person he had seen vaulting the fence (T. 58). Mr. Spielmans indicated that

Mr. Oliver was also the person he had identified in the photo spread and the lineup (T. 58).

On cross-examination, Mr. Spielmans indicated that his description for the police indicated that the person was "[m]ale, white, wearing a blue navy watch cap, very blond hair protruding from under it." (T. 61). He did not give a height or weight, and noted that the person had a Levi jacket and gold wire-rim clear-lensed glasses (T. 61-62). Mr. Spielmans could not recall if the person had any facial hair (T. 62). He did not recall if the person had glasses on when he was entering his car (T. 64). Mr. Spielmans indicated that as a result of having worked for corrections, he was familiar with Mr. Oliver's name, but that he was not told that Mr. Oliver was the person in the photo and photo spread until after he was shown the photo spread (T. 68).

Mr. Spielmans indicated that he told his colleagues in the intensive supervised parole unit about the events at his home, and that those people were responsible for Mr. Oliver's arrest (T. 69).

Lou Carol Roberts, a neighbor of John Spielmans, testified that on January 7, 1989, she saw a person running through her yard, indicating that his car had broken down (T. 73-74). She indicated that she later told the police that the person had blond hair that was short over the ears and longer in back, and did not give a description of his clothing (T. 75). She went to the home of a neighbor, Bob Borite, to discuss what she had seen, noticed the person standing by a car, and wrote down the license plate number of

the car (T. 76). She indicated that as she was watching the person, something startled him and he ran from the car (T. 76).

She ran to Mr. Spielmans', telling him that the person was trying to get into his car, and then Mr. Spielmans gave chase as the person got into his car (T. 76). She did not hear the person say anything as he got in his car (T. 77). She gave the license plate number to Mr. Spielmans (T. 82).

Ms. Roberts was shown a photo spread either the day after or a few days after, and selected a photo of the person she thought was the person she saw in her back yard (T. 78). She indicated that the photo she selected was the center one on the top row (T. 78). When Ms. Roberts viewed the photo spread, she indicated that the suspect might have been number two but that she was not exactly sure (T. 125). Ms. Roberts attended the lineup and could not identify anyone (T. 79). When the prosecutor asked her if she could identify the person she saw running through her yard, Ms. Roberts said, "No, it's been too long ago." (T. 79).

Ms. Roberts indicated that the officer did not come to her home the day after the events and show her one photo (T. 80).

She indicated that she did not get a good look at the person's face and did not know if he had any facial hair (T. 80). When she was asked how she identified the person in the photo spread, she indicated that only two of the people in the spread had the right hair color, and only one had the right haircut (T. 81). She did not remember the person wearing glasses (T. 82).

Robert Rufener, another neighbor of John Spielmans, testified that on January 7, at about 2:30, he heard his dog bark, and looked out the window to see a person going through some yards, getting in his car, and driving away (T. 83-85). The person was taller than Mr. Rufener, blond, with dark clothing and a mustache (T. 89). Mr. Rufener also identified the same photo from the photo spread as was identified by Ms. Roberts and Mr. Spielmans (T. 90). Mr. Rufener attended the lineup that was held in April, identifying a person but indicating that he was uncertain that the person was the one he had seen in January (T. 92). He identified Mr. Oliver in court as the person he had seen on January 7 (T. 92-93). Mr. Rufener was not asked whether he had been shown the single photograph.

Mr. Rufener indicated that the person he saw was not wearing glasses (T. 93).

Another neighbor of Mr. Spielmans, John R. Call, testified that on January 7, he was driving in his car and nearly hit a pedestrian running from the Rufener property (T. 96). This person was being chased by Mr. Spielmans (T. 97). The person was young (late twenties to early thirties), athletic, with long, blond hair (T. 98). The car was a grey two-door with a hatch back, and may or may not have been spotted, as if in preparation for repainting (T. 98-99). When Mr. Call was shown the photo spread, he was uncertain and could only identify two possible suspects (T. 99). When Mr. Call attended the lineup in April, he did not identify anyone and did not identify Mr. Oliver at trial (T. 99-100).

Mr. Call was not asked if he was shown the single photograph of Mr. Oliver.

Salt Lake Sheriff's Deputy, Kevin Matthews, testified that in investigating this case on January 7, he spoke with Mr. Spielmans, his son, and Mr. Rufener (T. 103-104). He indicated that Mr. Spielmans' description of the person was "Male, white, between the age of 25 to 30 years old, about five foot ten, 180 pounds, blond, curly hair, with wire rim glasses. Suspect was wearing black gloves, and ... a blue watchman type cap." (T. 105). He said that Mr. Rufener gave the same description (T. 105).

Officer Matthews indicated that all of the witnesses gave the same description of the car, that Mr. Spielmans indicated that it was a white over red older Monte Carlo (T. 105). Mr. Spielmans also gave the officer the license plate number of the car (T. 105). Officer Matthews indicated that he interviewed Mr. Call, but was not aware at that time that Mr. Call was a witness to the events in this case (T. 106).

Officer Matthews traced the footprints in the back yard to the Roberts' or Rufeners' yard (T. 107). Officer Matthews then checked the license plate number and drove to the residence of the registered owner (T. 108). As he approached the address of the vehicle, he did not see the vehicle, but parked his car down the street and approached a house next to the house of the registered owner to investigate (T. 108).

As Officer Matthews spoke with the neighbors, he saw a person matching the suspect's description exiting the home of the

registered owner of the suspect car (T. 109). Officer Matthews saw the person look at Officer Matthews and hurry to a car and leave (T. 111). The person and his friend who was with him both looked shocked and left in separate vehicles (T. 112). Officer Matthews identified Mr. Oliver as the suspect (T. 114).

Officer Matthews pursued the suspect, who was driving in a green Oldsmobile Cutlass (T. 112), but lost him in a subdivision (T. 116). The other person was driving a Ford Pinto (T. 112).

Officer Matthews had an idea that the suspect was Greg Oliver, and so he obtained a photograph of Mr. Oliver through the records division of Corrections and took it to Mr. Spielmans for identification (T. 116). When asked if he showed the single photo to any of the other witnesses, he could not recall (T. 116). He indicated that when he showed Mr. Oliver's photograph to Mr. Spielmans, he told Mr. Spielmans that he had "reason to believe this may be the person that entered his residence earlier that day." (T. 117). When Officer Matthews asked Mr. Spielmans if he could identify the person in the photo, Mr. Spielmans indicated, "That's the guy." (T. 117).

Officer Matthews indicated that Mr. Spielmans was the only witness he showed the single photo (as opposed to the spread), but his police report indicated, "I contacted the witnesses at their residences, ...and they were able to pick Mr. Oliver out a[s] the suspect in the burglary from a picture." (T. 122-123). Officer Matthews tried to explain the discrepancy by noting that he may have shown the photo to Mr. Spielmans' son, who did not see anything

(T. 122). When asked repeatedly about the discrepancy between the report and his testimony, Officer Matthews would not commit himself, answering with phrases like "I don't believe" and "all I remember" (T. 123).

He indicated that he had been trained that photo spreads are more desirable than photo showups, but indicated that he felt that because Mr. Spielmans worked for Adult Probation and Parole, and because Mr. Spielmans had indicated when reporting the burglary that he probably knew the suspect from his work with Probation and Parole, an exception would be appropriate (T. 124).

Vernon Beesley of the Sheriff's Office went to the Spielmans' residence on January 7 and was unable to obtain any useful fingerprints (T. 129-132).

Mr. Oliver testified that he had previously been convicted of aggravated robbery, and that a year after the conviction, he was acquitted when the actual robbers were caught (T. 149). He indicated that he later altered a prescription and was returned to the prison, with a sentence that expired in November of 1988 (T. 150). On January 7, Mr. Oliver weighed 159 pounds, his hair was short, he had no mustache, and did not wear glasses (T. 150). He indicated that previous to about July of 1989, he had never worn prescription glasses (T. 151).

He testified that on January 7, 1989, he attended a baby shower, arriving at noon or 2:00, and then drove in his Oldsmobile to the store (T. 151). He indicated that a person named Quentin borrowed Karen Weed's Monte Carlo, and told Mr. Oliver at about

4:00 p.m. that he had run from the police in it that day because the registration was not in order (T. 151-154).

Mr. Oliver described Quentin as almost six feet tall, with long blond hair that is sometimes pulled up in a cap (T. 156). Quentin did not tell Mr. Oliver about the robbery (T. 156).

Mr. Oliver indicated that as he left Karen Weed's house, he saw a police car, but thought nothing of it, and did not make any effort to evade the police (T. 155). The police car did not turn its red light on (T. 156).

Three weeks later, Quentin went to Las Vegas (T. 163). About a month after the baby shower, three parole officers arrested Mr. Oliver (T. 157), but Mr. Oliver had no opportunity to tell the police his side of the story (T. 163). Mr. Oliver did not burglarize Mr. Spielmans' home (T. 157).

Karen Weed testified in rebuttal for the State. She indicated that on January 7, 1990, her Monte Carlo was brown with grey primer spots and rust (T. 178). Mr. Oliver drove her to the baby shower in that car on January 7 (T. 179). She indicated that Quentin did not have permission to drive the Monte Carlo on the 7th (T. 179).

After Mr. Oliver was arrested, he asked Karen to testify for him that he was at the shower the whole time, but she did not know if he was or was not there the whole time (T. 181). She testified that Mr. Oliver had worn prescription glasses during the five years that she had known him, and that on January 7, she thought he owned a pair of gold rimmed glasses (T. 181).

She described Quentin as tall, skinny, with orange-red shoulder length frizzy hair and lots of facial blemishes, and indicated that he drove a 1976 Oldsmobile Cutlass (T. 182). She indicated that she and Quentin traded cars frequently and that her registration was expired on January 7 (T. 182-183).

When defense counsel asked Ms. Weed about a previous interview with the prosecutor and her previous recollection of the car Mr. Oliver was driving on January 7 when he picked her up from the baby shower, Ms. Weed indicated that she could not recall the car because she was on drugs (T. 183-184). Her children said that he was driving her Monte Carlo (T. 184). She indicated that they were in the Monte Carlo, but she had previously told the prosecutor that they were driving Mr. Oliver's Oldsmobile (T. 185).

SUMMARY OF ARGUMENT

The trial court's denial of trial counsel's motion for a continuance forced Mr. Oliver to be represented by counsel who had done no preparation for the trial, in violation of Mr. Oliver's rights to due process of law and effective assistance of counsel. Mr. Oliver must be retried.

The State failed to present evidence that the value of the property taken from the Spielmans' residence was at least two hundred and fifty dollars. When the case is retried, the theft charge must be reduced to a class A misdemeanor.

ARGUMENT

I.
MR. OLIVER WAS DENIED DUE PROCESS OF LAW AND/OR EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE TRIAL COURT FORCED THE TRIAL TO PROCEED, DESPITE THE FACT THAT DEFENSE COUNSEL HAD DONE NO PREPARATION.

On the first day of trial, Mr. Oliver's trial counsel moved for a continuance, explaining that trial counsel had expected to dispose of the case through a plea and had not done any preparation for trial of the case, "Based on that, I didn't do any formal trial preparation that I normally do for a trial such as this, and consequently, I am not prepared to proceed to trial." (T. 4). The trial court apologetically denied the motion for a continuance, indicating that although plea negotiations were continuing, the trial court had informed the parties on the Friday before the Tuesday trial that they should perform as if they were going to trial (T. 8-9).

Defense counsel argued that it was unfair for defense counsel to rely on the time frame for plea negotiations offered by the State and to be forced to go to trial without time for preparation (T. 7). The prosecutor, Ms. Byrne, indicated at the close of the State's case that she had contacted one of its witnesses on Friday and told her she did not need to come because Ms. Byrne anticipated the plea to be entered on Tuesday (T. 145).

Shortly after the State's case had been presented, the trial court made a record concerning the court's denial of the motion for a continuance, explicitly finding that any error in the

denial was harmless and not prejudicial to Mr. Oliver. The record indicates as follows:

> One thing. I think it's almost obvious, but sometimes obviousness gets lost in the record, particularly when the trial records that is not the one that handled things on appeal from the plaintiff's perspective. Each of the witnesses who testified yesterday, it seemed to me, that there was full availability of cross-examination by Mr. McCaughey and he took advantage of that. One of the reasons why I wanted to make sure whether or not Mr. McCaughey wanted the witnesses back was in the event there was any appeal on this question of a continuance, I want to make sure the record is very clear that full opportunity had been made available to the defendant, to the witnesses, and all of which indicates to me that where I think I'm absolutely correct on denying the motion to a continuance, even if for some reason I'm wrong, is it's very clear that any error has been harmless in the sense that full access has been had to witnesses, and in fact, since the trial did not conclude in the first day, that there has been extra time to prepare, extra time to do whatever is necessary, so that there's no conditions of denial on the motion for continuance, except for moving the case along, which is a bearable factor.
>
> Furthermore, it appears to me that there may have been some benefit in the sense that this witness you mentioned, Mrs. Lehman [State's witness], is not available.
>
> MR. MCCAUGHEY: I appreciate that with the witnesses and making sure that we can have them come back.
>
> THE COURT: Do you want any witnesses back?
>
> MR. MCCAUGHEY: I do not, your Honor....
>
> ....
>
> Sometimes you have to take advantage of the record to express your feelings at the time, and that's --
>
> ....
>
> That's sort of what I was doing.
>
> THE COURT: I'm not saying anything was untoward. The record is there for a purpose. You use it for the correct purpose. I believe I use it for the correct purpose today.

(T. 146-147).

A. PREPARATION OF THE ACCUSED'S DEFENSE IS ESSENTIAL TO RIGHTS TO DUE PROCESS OF LAW AND TO EFFECTIVE ASSISTANCE OF COUNSEL.

Procedural due process recognizes that a party must have the opportunity to prepare a defense. Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983).[1]

Several cases on the topic of effective assistance of counsel[2] recognize that trial counsel are expected to prepare to defend a criminal defendant.

The need for preparation of the defense case was recognized in State v. Templin, 149 Utah Adv. Rep. 14 (Utah 1990). The court there began its analysis by quoting the basic Strickland test:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Id. at 15, quoting Strickland v. Washington, 466 U.S. 668, 687 (1984).

The Templin court found that the first prong of the Strickland test had been met because defense counsel had failed to

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1. Due process of law is guaranteed by Article I section 7 of the Utah Constitution, and by the fourteenth amendment to the United States Constitution.

2. The rights to effective assistance of counsel and to present a defense are provided in Article I section 12 of the Utah Constitution and the sixth amendment to the United States Constitution.

procure defense witnesses to support Mr. Templin's testimony. The court stated,

> If counsel does not adequately investigate the underlying facts of a case, including the availability of prospective defense witnesses, counsel's performance cannot fall within the "wide range of reasonable professional assistance." This is because a decision not to investigate cannot be considered a tactical decision. It is only after an adequate inquiry has been made that counsel can make a reasonable decision to call or not to call particular witnesses for tactical reasons.

Templin, 149 Utah Adv. Rep. at 16 (footnote, citation omitted).

The Templin court found that the second prong of the Strickland test had been met in that case because the trial attorney had failed to obtain defense witnesses that would have impacted on the credibility of the two opposing witnesses in the case, and the testimony of those witnesses would have impacted the "'entire evidentiary picture.'" Templin at 17, quoting Strickland at 696.

In Strickland v. Washington, 466 U.S. 668 (1984), the Court explained,

> [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Id. at 691.

In State v. Crestani, 771 P.2d 1085 (Utah Ct. App. 1989), this Court found that trial counsel was ineffective in failing to obtain pertinent bank records involved in the case, and in failing to prepare defense witnesses for their testimony in court.

After discussing the Strickland standards, this Court quoted Jennings v. State, 744 P.2d 212 (Okla. Crim. App. 1987), for further explanation of trial counsel's duty to prepare:

> "When counsel knows of the existence of a person or persons who possess information relevant to his client's defense and he fails to use due diligence to investigate that evidence, such a lack of industry cannot be justified as 'strategic error.' The American Bar Association Standards for Criminal Justice, Defense Function 4-4.1, maintain that: "it is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."

Id. at 1091, quoting Jennings at 214.

B. THE TRIAL COURT'S DENIAL OF THE MOTION FOR CONTINUANCE FORCED MR. OLIVER TO GO TO TRIAL WITHOUT PREPARATION OF HIS CASE, AND REQUIRES A NEW TRIAL.

When trial counsel was forced to go to trial without any preparation (T. 4), Mr. Oliver was forced to go to trial in violation of his right to prepare his defense, see Nelson v. Jacobson, supra, and with representation falling below objective standards of reasonable performance. See Templin, Crestani, and Strickland, supra.

Whether this Court views the violation in this case as a due process violation, requiring error to be harmless beyond a reasonable doubt,[3] or as an effective assistance of counsel

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3. See Chapman v. California, 386 U.S. 18, 23 (1967)(if constitutional errors are not harmless beyond a reasonable doubt, reversal is required).

violation, requiring error to undermine confidence in the verdict,[4] Mr. Oliver is entitled to a new trial.

The trial court did not address the continuance issue in terms of due process or effective assistance of counsel. The trial court did, however, conclude that Mr. Oliver was not prejudiced by the trial court's failure to grant the motion for continuance, because defense counsel had full access to the witnesses who testified, because the trial ran overnight (allowing extra preparation time), and because one of the State's witnesses was unavailable to testify (T. 146-147). The factual predicates of the trial court's ruling are reviewable for clear error, and the legal conclusions to be drawn from the facts in this case are open for this Court's independent evaluation. State v. Crestani, 771 P.2d 1085, 1089 (Utah Ct. App. 1989)(citation omitted).

Several aspects of Mr. Oliver's case demonstrate that he was prejudiced by the denial of the motion for continuance.

1. The trial court should have granted the continuance so defense counsel could have supported Mr. Oliver's testimony about his previous conviction based on misidentification.

As noted in the statement of facts, the prosecution of Mr. Oliver was based primarily on the eyewitness identification by four witnesses who saw a person in the vicinity of the burglary and theft. The essence of Mr. Oliver's defense was that the State's

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4. See Strickland v. Washington, 466 U.S. 668, 694 (1984)(denial of effective assistance of counsel requires reversal if confidence in verdict is undermined).

error. The inclusion of proper support for Mr. Oliver's defense concerning eyewitness misidentification could have "affected the entire evidentiary picture," calling the verdict in this case into question, Templin, supra, and cannot be considered harmless beyond a reasonable doubt. Chapman, supra.

2. The trial court should have granted the continuance so defense counsel could have fully explored and exposed the weaknesses in the eyewitness identifications in this case.

a. Trial counsel could have addressed the prejudice arising from the placement of the photo from the showup in the photo array.

At least one of the four eyewitnesses was shown a one photo, mug shot showup the day after the crime, and was subsequently shown a photo array and lineup, and identified Mr. Oliver as the perpetrator of the crime in this case (T. 52, 54, 58, 61, 116-117, 127-128; R. 3, M.H. 233-234).

The same mug shot used in that show up was placed in the photo array that was shown to all of the State's witnesses (M.H. 228-230, in Appendix 3).

At the pretrial motion to suppress eyewitness identification, Mr. Oliver was represented by Lynn R. Brown of the Salt Lake Legal Defender Association (M.H. 219). However, at trial, Mr. Oliver was represented by new, private counsel. The prosecutor and trial court apparently forgot that the mug shot (State's Exhibit 1 from the motion to suppress) was part of the photo array, and thought that the one photo from the showup had been lost (T. 52-53, 59-60, in Appendix 4).

Had the trial court granted adequate preparation time, trial counsel could have reviewed the motion to suppress and addressed the prejudice arising from this repeated suggestion of Mr. Oliver's mug shot in the showup and then in the photo array.

b. Trial counsel could have addressed the possibility that more than one of the State's witnesses were tainted by the improper, one photo mug shot showup.

Salt Lake Sheriff's Deputy, Kevin Matthews, testified that in investigating this case on January 7, he had an idea that the suspect was Mr. Oliver, and so he obtained a photograph of Mr. Oliver through the records division of the Department of Corrections and took it to Mr. Spielmans for identification (T. 116). He indicated that when he showed Mr. Oliver's photograph to Mr. Spielmans, he told Mr. Spielmans that he had "reason to believe this may be the person that entered his residence earlier that day." (T. 117). When Officer Matthews asked Mr. Spielmans if Mr. Spielmans could identify the person in the photo, Mr. Spielmans pointed at the photo and said, "That's the guy." (T. 117).[6]

When asked if he showed the single photo to any of the other witnesses, he did not recall having done so (T. 116). His police report indicated, "I contacted the witnesses at their residences, ...and they were able to pick Mr. Oliver out a[s] the

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6. Compare Officer Matthews' testimony at the motion to suppress, "And Mr. Spielmans observed the picture and stated that he felt positive that that was the suspect." (M.H. 267, 271-272). Compare Mr. Spielmans' testimony that he indicated that the photo appeared to be the person (T. 52).

Further, Officer Matthews' encounter with Mr. Oliver and the subsequent investigation and prosecution may have been tainted by the fact that when Officer Matthews was at the neighbors' house, they informed him that their neighbor, Mr. Oliver, had recently been released from prison (M.H. 261).

Had the trial court granted adequate preparation time, trial counsel could have sought the evidence necessary to corroborate Mr. Oliver's testimony concerning the police misconduct in this case, which may have borne directly on Officer Matthews' credibility, and the identification procedures used in this case.

Particularly when combined with the other omissions of preparation in this case, trial counsel's failure to procure and present evidence to support Mr. Oliver's testimony and to contradict Officer Matthews' testimony calls for a new trial under the Strickland and Chapman standards.

II.
THE TRIAL COURT SHOULD HAVE REDUCED THE THEFT COUNT TO A CLASS A MISDEMEANOR.

Utah Code Ann. section 76-6-412 classifies theft according to the value of property taken. It provides, in part, as follows:

> (1) Theft of property and services as provided in this chapter shall be punishable:
> ....
> (b) as a felony of the third degree if the:
> (i) value of the property or services is more than $250 but not more than $1,000;
> ....
> (c) as a class A misdemeanor if the value of the property stolen was more than $100 but does not exceed $250.
> ....

When the officer from the Sheriff's office came to Mr. Spielmans' home, Mr. Spielmans determined that a watch, a ring, four one dollar bills, and four or five coins worth about seventy five cents each were missing (T. 43, 71). Mr. Spielmans estimated the value of the watch to be $125, and could not remember what value he had placed on the ring, indicating that the police report would contain the correct estimate on the value of the ring (T. 48-49). After an attempt to refresh his recollection by having him read the police report, Mr. Spielmans could not recall the value he placed on the ring, indicating that the police report was accurate but that he personally could not recall (T. 50). Mr. Spielmans later discovered four or five Canadian dollars worth about seventy-five cents a piece were missing (T. 71). Mr. Spielmans never indicated personal knowledge of the value of the ring, and the police report was not admitted into evidence. See State v. Morrell, 149 Utah Adv. Rep. 26, 29 (Utah Ct. App. 1990)(police reports are not admissible under business and public records exceptions to the hearsay rule in most circumstances). The ring was not presented in evidence.

Thus, it appears that the approximate value of the property properly established by the State was $140.

When defense counsel moved for a reduction of the theft charge to a class A misdemeanor, the court denied the motion, finding that Mr. Spielmans had testified that the police report had refreshed his recollection. The trial court's finding is subject to the "clearly erroneous" standard of appellate review, adopted from interpretations of federal rules of civil procedure and discussed in

State v. Walker, 743 P.2d 191 (Utah 1987). The standard was explained in Walker as follows: "[I]f the findings (or the trial court's verdict in a criminal case) are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings (or verdict) will be set aside." Id. at 193. This court's review of Mr. Spielmans' testimony will reveal that the trial court's finding was clearly erroneous. See Appendix 3, containing trial court's finding and pertinent pages of Mr. Spielmans' testimony.

Even if this Court views the issue as the review of the jury's verdict and applies the deferential standard of review applicable thereto, State v. Johnson, 774 P.2d 1141 (Utah 1989), the evidence is insufficient. Cf. State v. Ballenburger, 652 P.2d 927 (Utah 1982)(per curiam)(discussing modes of proof of value of stolen property).

CONCLUSION

This Court should remand this case to the trial court for a new trial, instructing on the importance of adequate preparation of Mr. Oliver's defense. Because the State presented evidence supporting the misdemeanor theft conviction, rather than the felony conviction, Mr. Oliver must be retried on the misdemeanor theft charge.

Respectfully submitted this 26th day of February, 1991.

ELIZABETH HOLBROOK
Attorney for Mr. Oliver

CERTIFICATE OF MAILING

I, Elizabeth Holbrook, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals and that four copies of the foregoing will be delivered to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah, 84114, this 26th day of February, 1991.

ELIZABETH HOLBROOK

DELIVERED by _____ this _____ day of February, 1991.

_____

APPENDICES

APPENDIX 1

CONSTITUTIONAL PROVISIONS

TEXT OF CONSTITUTIONAL PROVISIONS

Article I, § 7 of the Constitution of Utah provides:

> **Sec. 7. [Due process of law.]**
> No person shall be deprived of life, liberty or property, without due process of law.

Article I, § 12 of the Constitution of Utah provides:

> **Sec. 12. [Rights of accused persons.]**
> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Amendment XIV to the Constitution of the United States provides:

> **Section 1.**
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX 2

MOTION FOR EVIDENTIARY HEARING

ELIZABETH HOLBROOK, #5292
Attorney for Defendant/Appellant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	MOTION FOR SUSPENSION OF RULES, REMAND, AND STAY OF APPELLATE PROCEEDINGS
Plaintiff/Appellee,	:	
v.	:	
GREG N. OLIVER,	:	Case No. 890625-CA Priority No. 2
Defendant/Appellant.	:	

A. PROCEDURAL AND FACTUAL CONTEXT

Mr. Oliver was tried and convicted by a jury of Burglary and Theft on September 5 and 6 of 1989, sentenced to the Utah State Prison for concurrent terms of zero to five and one to fifteen years, and ordered to pay restitution (R. 166-167).[1]

On the first day of trial, Mr. Oliver's trial counsel moved for a continuance, explaining that trial counsel had expected to dispose of the case through a plea and had not done any preparation for trial of the case, "Based on that, I didn't do any formal trial preparation that I normally do for a trial such as this, and

1. The district court pleadings file will be referred to as "R.". The transcript of the hearing on the motion to suppress will be referred to as "M.H.". The transcript of the trial (contained in two volumes, numbered consecutively) will be referred to as "T.".

consequently, I am not prepared to proceed to trial." (T. 4). The trial court apologetically denied the motion for a continuance (T. 9).

Shortly after the State's case had been presented, the trial court made a record concerning the court's denial of the motion for a continuance, explicitly finding that any error in the denial was harmless and not prejudicial to Mr. Oliver (T. 146-147).

Mr. Oliver seeks a remand to the trial court to establish that the denial of the motion for continuance resulted in the denial of his rights to due process of law and effective assistance of counsel.

- - -

This case involves a burglary and theft that occurred on January 7, 1989 (R. 6-7). The prosecution of Mr. Oliver was primarily based on the eyewitness identification of four witnesses who saw a person in the vicinity of the burglary and theft.

- - -

The essence of Mr. Oliver's defense was that the State's eyewitnesses had misidentified him as the person in the vicinity of the burglary and theft--he testified that he had previously been convicted of aggravated robbery on the basis of eyewitness identification and that he was later acquitted of that conviction when his innocence was established (T. 149). His testimony on this point was as follows:

> Okay. Mr. Oliver, have you ever been convicted of a felony?
> Yes, I was.
> When was that?

> First, it was back in '83. I was convicted of aggravated robbery, and the jury trial was convicted because I have this blond hair. A year later they caught the guys that did it, and I was acquitted.
> Okay.
> They took me from prison and brought me back here to jail, and I--in '82 I had my right hand severed off and I filled a prescription and--
> Forged a prescription?
> I altered it. I filled it. Somebody else forged it. I filled it and the doctor give me Motrin.
> Were you convicted for that?
> Yes. The put that--charged me in that and convicted me of that and sentenced me back to prison.
> Then you were on parole?
> Yes. They let me out on parole after that. And I expirated in November of '88.

(T. 149-150)(emphasis added).[2]

As is discernable from examination of the emphasized portion of Mr. Oliver's testimony, supra, there were problems with Mr. Oliver's credibility. In addition to his admission that he had been involved in and convicted of forgery, the jurors were also faced with Officer Matthews' testimony that Officer Matthews had a hunch that the offender in this case was Mr. Oliver (T. 116). Officer Matthews also indicated that when Mr. Spielmans reported the crime, Mr. Spielmans seemed to think that he knew the suspect from his work with Adult Probation and Parole (T. 124).

---

2. In closing argument, trial counsel argued, in part, as follows:

> Ladies and gentlemen, Mr. Oliver, as he testified was sent to prison once on mistaken identity. And was released when they caught the right person. I would ask you not let that happen again, to review this evidence and bring back a verdict of not guilty on both charges.

(T. 201).

Trial counsel should have procured evidence to support Mr. Oliver's testimony. A review of the district court pleadings file in the 1982 case referred to by Mr. Oliver establishes that Mr. Oliver was in fact convicted and that the conviction was later set aside when the actual perpetrators confessed. Trial counsel for Mr. Oliver in the 1982 case indicates that the basis of that conviction was misidentification of Mr. Oliver. See Appendix 1, containing the affidavit of counsel; Appendix 2, containing certified documents from the district court pleadings file in the 1982 misidentification, aggravated robbery case; State v. Templin, 149 Utah Adv. Rep. 14 (Utah 1990)(ineffective assistance of counsel established when trial counsel failed to call witness to corroborate defendant's testimony).

The trial court should have granted the motion for the continuance so that trial counsel could prepare to represent Mr. Oliver.

- - -

Salt Lake Sheriff's Deputy, Kevin Matthews, testified that in investigating this case on January 7, he had an idea that the suspect was Mr. Oliver, and so he obtained a photograph of Mr. Oliver through the records division of the Department of Corrections and took it to Mr. Spielmans for identification (T. 116). He indicated that when he showed Mr. Oliver's photograph to Mr. Spielmans, he told Mr. Spielmans that he had "reason to believe this may be the person that entered his residence earlier that day" (T. 117). When Officer Matthews asked Mr. Spielmans if

Mr. Spielmans could identify the person in the photo, Mr. Spielmans pointed at the photo and said, "That's the guy." (T. 117).[3]

When asked if he showed the single photo to any of the other witnesses, he did not recall having done so (T. 116). His police report indicated, "I contacted the witnesses at their residences, . . . and they were able to pick Mr. Oliver out a[s] the suspect in the burglary from a picture." (T. 122-123)(emphasis added). Officer Matthews tried to explain the report by noting that he may have shown the photo to Mr. Spielmans' son, who did not see a suspect at the scene of the crime (T. 122). When asked repeatedly about the discrepancy between the report and his testimony, Officer Matthews would not commit himself, answering with phrases like "I don't believe" and "all I remember" (T. 123).

As is demonstrated by review of the record in this case, trial counsel did not ask two of the four eyewitnesses if Officer Matthews had shown them the one photo, mug shot show up of Mr. Oliver prior to their exposure to the photo array, the line-up, or Mr. Oliver's in-court appearance (T. 83-95; 95-102).

Trial counsel should have addressed the possibility that three of the four eyewitnesses were improperly tainted by the one

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3. Compare Officer Matthews' testimony at the motion to suppress, "And Mr. Spielmans observed the picture and stated that he felt positive that that was the suspect." (M.H. 267, 271-272). Compare Mr. Spielmans' testimony that he indicated that the photo appeared to be the person (T. 52).

photo, mug shot show up.[4]

The trial court should have granted the motion for the continuance so that trial counsel could prepare to represent Mr. Oliver.

- - -

As was discussed above, at least one of the eyewitnesses was shown a one photo, mug shot show up the day after the crime, and was subsequently shown a photo array and line-up, and identified Mr. Oliver as the perpetrator of the crime in this case (T. 52, 54, 58, 61, 116-117, 127-128; R. 3, M.H. 233-234).

The same mug shot used in that show up was placed in the photo array that was shown to all of the State's witnesses (M.H. 228-230, in Appendix 3).

At the pretrial motion to suppress eyewitness identification, Mr. Oliver was represented by Lynn R. Brown of the Salt Lake Legal Defender Association (M.H. 219). However, at trial, Mr. Oliver was represented by new, private counsel. The prosecutor and trial court apparently forgot that the mug shot (State's Exhibit 1 from the motion to suppress) was part of the photo array, and thought that the one photo from the show up had been lost (T. 52-53, 59-60, in Appendix 4).

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4. The eyewitness who indicated that she was not shown the one photo, mug shot show up identified Mr. Oliver in the photo array and did not identify anyone at the line up or at trial (T. 78-80). questioned by the police or given an opportunity to tell his side of the story (T. 151, 163).

Trial counsel should have reviewed the motion to suppress and addressed the prejudice arising from this repeated suggestion of Mr. Oliver's mug shot in the show up and then in the photo array.

The trial court should have granted the motion for the continuance so that trial counsel could prepare to represent Mr. Oliver.

- - -

The essence of Mr. Oliver's view of the case was that he was innocent and that his conviction was based on police misbehavior and failure to investigate honestly. He indicated that he was never questioned by the police or given an opportunity to tell his side of the story (T. 151, 163).

Although Mr. Oliver indicated that his parole had expired in November of 1988 (T. 150), he was arrested by three parole officers (T. 156-157).

He disputed Officer Matthews' testimony that Mr. Oliver had evaded Officer Matthews during the investigation of the crime (T.108-112), indicating that Mr. Oliver did not hear a siren, and asking that Officer Matthews be recalled and asked if Officer Matthews had turned his red light on (T. 155-156, 165). While Officer Matthews testified that he saw Mr. Oliver exiting Karen Weed's home during the alleged evasion, Mr. Oliver indicated that a photograph of the scene would have shown that from where Officer Matthews was standing, his view of Karen Weed's home was blocked by a fence (T.160-161).

Trial counsel should have sought the evidence necessary to corroborate Mr. Oliver's testimony concerning the police misconduct in this case, which may have borne directly on Officer Matthews' credibility and the identification procedures used in this case. See Templin, supra.

The trial court should have granted the motion for the continuance so that trial counsel could prepare to represent Mr. Oliver.

B. LEGAL BASIS FOR ALLEGATIONS OF DENIAL OF DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL

Article I section 7 of the Utah Constitution guarantees all people the right to due process of law: "No person shall be deprived of life, liberty or property, without due process of law." Article I section 12 of the Utah Constitution provides more specific protections to those accused of crime:

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

The sixth and fourteenth amendments to the United States Constitution provide the accused with rights to due process and assistance of counsel.[5]

These constitutional provisions and the counterparts have been interpreted and applied in contexts similar to the instant one, and support Mr. Oliver's assertions that the trial court's denial of the motion for continuance, trial counsel's lack of preparation in this case, and improper identification procedures and other police misconduct denied him due process of law and effective assistance of counsel and void his convictions. E.g., Nelson v. Johnson, 669 P.2d 1207 (Utah 1983)(component of due process is provision of adequate time for preparation of defense); State v. Templin, 149 Utah Adv. Rep. 14 (Utah 1990)(effective assistance of counsel requires

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5. The sixth amendment provides,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Section 1 of the fourteenth amendment provides,

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

investigation and preparation of defense); State v. Thamer, 777 P.2d 432 (Utah 1989)(due process requires reliable eyewitness identification).[6]

CONCLUSION

Mr. Oliver seeks a remand to the trial court to determine whether trial counsel's performance was objectively deficient and prejudicial, Strickland v. Washington, 466 U.S. 668, 687 (1984), and to determine whether the trial court's failure to grant the continuance and the improper identification procedures require a new trial in this case.

In the alternative, Mr. Oliver requests that the due date for his opening brief be extended until fifteen days after disposition of the motion to remand.

RESPECTFULLY SUBMITTED this 15 day of January, 1991.

ELIZABETH HOLBROOK
Attorney for Mr. Oliver

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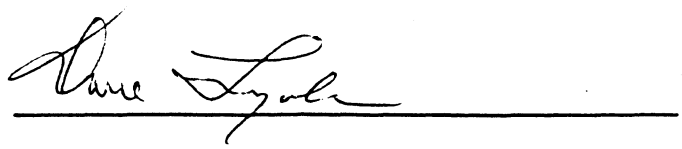
6. Mr. Oliver is aware that in order to rely on the Utah Constitution, he must present adequate briefing on the matter in the trial court, State v. Earl, 716 P.2d 803 (Utah 1986), and intends to do so in the event that this Court grants the remand.

DELIVERED/MAILED a copy of the foregoing to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 22 day of January, 1991.



Appendix 1

(to motion for evidentiary hearing)

ELIZABETH HOLBROOK, #5292
Attorney for Defendant/Appellant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	AFFIDAVIT
Plaintiff/Appellee,	:	
v.	:	
GREG N. OLIVER,	:	
Defendant/Appellant.	:	Case No. 890625-CA Priority No. 2

STATE OF UTAH)
) ss:
COUNTY OF SALT LAKE)

I, ELIZABETH HOLBROOK, declare under penalty of perjury that the following is true and correct:

1. I am an attorney licensed to practice law in the State of Utah and employed as an appellate attorney at the Salt Lake Legal Defender Association.

2. I am the attorney appointed to represent GREG N. OLIVER in the above-captioned case during the pendency of his appeal.

3. I was not present during the trial of this matter and did not represent Mr. Oliver at trial.

4. I have spoken with Robert N. Macri, the attorney who represented Mr. Oliver in the aggravated robbery/misidentification case documented in Appendix 2 to this brief.

5. It is my understanding from talking to Mr. Macri that:

(a) in that aggravated robbery case, Mr. Oliver was convicted on the basis of eyewitness identification testimony of two witnesses;

(b) Mr. Oliver was later acquitted of that charge when the real perpetrator of the crime was found.

(c) Visual comparison of Mr. Oliver and the perpetrator of the aggravated robbery demonstrates effectively Mr. Oliver's argument that eyewitness identification is unreliable.

DATED this 18 day of January. 1991.

ELIZABETH HOLBROOK

SUBSCRIBED and SWORN to before me this 18th day of January, 1991.

Notary Public
DIANE SHEPHERD
47 W. 200 So. Suite 430
Salt Lake City, Utah 84101
My Commission Expires
April 13, 1993
State of Utah

NOTARY PUBLIC
Residing in Salt Lake City, Utah

My Commission Expires:
4-13-93

Appendix 2

(to motion for evidentiary hearing)

In the District Court of Davis County
State of Utah

FILED
JUL 1 1983
MICHAEL G. ALLPHIN, Clerk
Davis County, Utah

THE STATE OF UTAH, Plaintiff
vs.
GREGORY NESS OLIVER
_____, Defendant

JUDGMENT, SENTENCE AND COMMITMENT TO THE UTAH STATE PRISON

Case No. 4215

That whereas, said defendant, GREGORY NESS OLIVER
(Name)
having heretofore on the 9th day of June, A. D. 19 83,
Having been convicted by a Jury (Plead Guilty or Having Been Convicted By a Jury) in this court of (To Of) the
the charge of Aggravated Robbery, second degree felony
(Name of Crime) a felony
and now being present in court, accompanied by his attorney, and ready for sentence, thereupon the court renders its judgment as follows:

You, Gregory Ness Oliver
having
Having been convicted by a Jury (Plead Guilty or Having Been Convicted By a Jury), the court adjudges you to
be guilty and it is the judgment of the court and the sentence of the law that you
Gregory Ness Oliver
for your said offense do be confined in the Utah State Prison for the term of one to fifteen years
(Indeterminate Sentence)

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the said
Gregory Ness Oliver
(Name of Prisoner) be sentenced to imprisonment
in the Utah State Prison for a term of ~~one to fifteen years, AND PAY RESTITUTION IN~~ THE AMOUNT OF $550.00.
said sentence to begin as of June 28, 19 83.

NOW, THEREFORE, you Gregory Neas Oliver
(Name of Prisoner), the
above named defendant, are remanded into the custody of the Sheriff of Davis County, State of Utah, to be by him delivered into the custody of the Warden, or other proper officer of said Utah State Prison in execution of this judgment and sentence.

WITNESS: Honorable Douglas L. Cornaby,
Judge, and the seal of the District Court of the Second Judicial District in and for the State of Utah affixed this 28 day of June, A. D. 19 83.

RODNEY W. WALKER
Clerk of the District Court of the Second Judicial District in and for Davis County, State of Utah.

By _____
Deputy Clerk

FILMED

Received this 29th day of June, 1983, from Brant Johnson, Sheriff of Davis County, Utah, the person of Gregory Ness Oliver for the term of 1 to 15 Yrs at the Utah State Prison for Aggr. Robbery.

Also 1 Yr for Theft.

Kenneth V. Shulsen, Warden

Beverley Tisher
I.D. & Records Officer

16375

Circuit Court, State of Utah

Davis County, Bountiful Department

STATE OF UTAH
~~XXXXXXXXXXXXXXX~~

vs.

GREGORY NESS OLIVER
Defendant

Commitment

U-979

THE STATE OF UTAH TO ANY PEACE OFFICER IN THE STATE OF UTAH:

The above-named defendant has been charged with the crime of

THEFT

at BOUNTIFUL, DAVIS COUNTY, UTAH

date JULY 15, 1980

(~~X) have ordered that bail for the defendant be in the amount of $~~XXXXXXXXXXXXXXXXXX

(X) The defendant was found guilty and was sentenced to pay a fine of

$ 00 and to be imprisoned in the county jail for 365 days and

0 days of the imprisonment was suspended upon payment of the fine

YOU ARE COMMANDED to take the defendant into your custody and safely keep the defendant:

(~~x) until he shall give bail in the amount of $xxxxxxxxxxxxxxxxxxxxxxxxxx or is legally discharged~~

(x) until he shall serve out the imprisonment of 365 days.

(~~x) until he shall pay the fine in the amount of $xxxxxxxxxxxxxxxxxxxx~~

(~~x) Defendant has made arrangements with the court to pay the fine.~~

Special instructions: THIS TIME MAY BE SERVED CONCURRENTLY WITH ANY JAIL SENTENCE DISTRICT COURT MIGHT LEVY ON MR. OLIVER ON JUNE 28, 1983 IF THE SENTENCE IN DISTRICT COURT IS LESS THAN 1 YEAR, MR. OLIVER MUST COMPLETE THE YEAR ON THE SENTENCE ON THIS CHARGE

Dated JUNE 27, 1983

ROBERT MACRI, Esq.
Attorney for Defendant
354 East 600 South
Salt Lake City 84111
Tel 364-3018

IN THE DAVIS COUNTY DISTRICT COURT OF UTAH

THE STATE OF UTAH, Plaintiff	:	
vs.	:	MOTION FOR NEW TRIAL and NOTICE OF HEARING
GREGORY NESS OLIVER, Defendant	:	No. Cr 4215

COMES NOW DEFENDANT GREGORY N. OLIVER, through his attorney of record, and moves this Court for a new trial in the above captioned matter for the reason that newly discovered evidence proves conclusively that Defendant did not commit the crime for which he has been declared guilty and confessions obtained by Davis County law enforcement officials from the guilty parties require that such new trial be granted.

Dated this 13th August, 1983.

Robert Macri

Robert Macri

NOTICE OF HEARING

Please note that Defendant's Motion for New Trial will be heard Tuesday, August 16, 1983 in the above captioned Court at the hour of 1:30 P.M. or as soon thereafter as same may be heard.

Robert Macri

Certificate of Mailing

I certify I mailed a copy of the foregoing Motion for New Trial and Notice of Hearing to Mr. Mel Wilson, Esq., Deputy County Attorney, Davis County Courthouse, Farmington Utah 84025. postpaid this 13th August, 1983.

Robert Macri

STATE OF UTAH)
COUNTY OF DAVIS) ss

I THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF DAVIS COUNTY, UTAH DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND SEAL OF SAID OFFICE
THIS 13 DAY OF Dec. 19 90

ALYSON E. BROWN, CLERK

In the District Court of the Second Judicial District

IN AND FOR THE

County of Davis, State of Utah

STATE OF UTAH
Plaintiff

vs.

GREGORY NESS OLIVER
Defendant

MINUTE ENTRY

Date August 16, 1983

Case No. 4215

CALVIN GOULD, Judge

J. Jones, Reporter
C. Long, Clerk

This matter comes before the Court for hearing on Motion for New Trial with Melvin C. Wilson, Esq. appearing as counsel for plaintiff. Defendant is present and represented by Robert Macri, Esq.

Plaintiff's counsel makes statement to the Court representing there has been further investigation in this matter, and based upon that investigation and copies of confessions of two other parties, moves to dismiss this case.

Court orders the defendant released from custody of the Utah State Mrison. Motion granted.

STATE OF UTAH)
COUNTY OF DAVIS) ss
I THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF DAVIS COUNTY, UTAH DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.
WITNESS MY HAND SEAL OF SAID OFFICE
THIS 18 DAY OF Dec. 1990
ALYSON E. BROWN, CLERK
BY Kristine Booth

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH

1983 SEP 19 AM 11: 47

MICHAEL C. ALLPHIN, CLERK
2ND DISTRICT COURT
BY _____
DEPUTY CLERK

THE STATE OF UTAH,	:	
Plaintiff,	:	
vs.	:	ORDER RELEASING EVIDENCE
GREGORY N. OLIVER	:	Case No. 4215
Defendant.	:	

FILMED

The above matter having come before the Court at the request of the Defendant for an Order releasing evidence and it appearing to the Court that the previous conviction having been set aside and the Information dismissed and all time periods for appeal having elapsed;

NOW THEREFORE IT IS HEREBY ORDERED that the Clerk of the Court shall release to Gregory Oliver one levi jacket presently being held in evidence in regards to the above-mentioned case.

Dated this 16 day of September, 1983.

BY THE COURT:

Second District Judge

I, ALYSON E. BROWN, CLERK OF THE DISTRICT COURT OF DAVIS COUNTY, UTAH DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND SEAL OF SAID OFFICE

THIS 18 DAY OF Dec. 1990

ALYSON E. BROWN, CLERK

BY Kristine Brother

Appendix 3

(to motion for evidentiary hearing)

that time?

A Yes, he did.

Q And did he show you one or more pictures?

A One picture.

MS. BYRNE: May I approach the witness, Your Honor?

THE COURT: You may.

MS. BYRNE: Your Honor, do we need this marked for this hearing, for purposes of this hearing?

MR. BROWN: For purposes of my motion, I would like the picture separated from the others as a separate exhibit.

THE COURT: Let me ask you this: if this matter goes to trial, is the photo array going to be an exhibit?

MS. BYRNE: Yes, it will be, Your Honor.

THE COURT: How are those attached in the folder?

MS. BYRNE: I was just checking that here. They seem to be affixed on two sides with Scotch tape.

THE COURT: Why don't we do this, why don't we take the picture in question from the photo array and mark it on the back.

MS. BYRNE: All right.

THE COURT: That way, if we need the entire array again we will have a clear record of everything.

MS. BYRNE: We are going to use the photo array

again immediately after this, so--

THE COURT: All right. Then you can put the individually-marked picture back in, or it can be just loose.

MS. BYRNE: You have seen that?

MR. BROWN: Yes.

Q (By Ms. Byrne) I am showing you what has been marked as State's Exhibit No. 1 for identification. Have you seen that picture before?

THE COURT: Mr. Brown, can the record reflect that the picture in question is only the picture on the left side as you look at that exhibit, rather than both pictures?

MS. BYRNE: Thank you, Your Honor.

MR. BROWN: Yes.

THE COURT: All right.

THE WITNESS: It seems to be the exact picture I saw.

Q (By Ms. Byrne) And to the best--

MR. BROWN: To clear that up, the exact picture you saw--

MS. BYRNE: That's what I was about to do. But go ahead, if you would like.

MR. BROWN: Go ahead.

MS. BYRNE: Okay.

Q (By Ms. Byrne) So to the best of your recollection, this is a picture that Officer Matthews showed you on January 8?

A That's right.

Q Do you recall what time of day that was?

A Late afternoon, I believe. Could have been 3:00. 3:00 to 6:00. I'm not really-- I can't be more precise than that.

Q At the time Officer Matthews showed you that picture, did he ask you any questions at that time?

A Not that I can recall precisely.

Q Did you make any statement when you saw that picture?

A I believe I said it appears to be.

Q You would have said it appears to be-- It appears to be?

A Yes.

Q It appears to be what?

A The individual that I saw the day previously.

Q At any time after January 8, did he show you any other pictures?

A Detective Matthews did not.

Q Did another officer show you any pictures?

A Yes. Detective Carr showed me a photo spread.

MS. BYRNE: For the record, I have taken what was

marked as State's Exhibit No. 1 and I have placed it in its original position in the six-picture lineup that has been marked as State's Exhibit No. 2.

Q (By Ms. Byrne) Looking at State's Exhibit No. 2, do you recognize that?

A I recognize it as the defendant?

Q Excuse me?

A I recognize that guy as the defendant.

Q Do you recognize that photo spread as a whole?

A It's the same format. I can't say the other pictures are the same.

Q You can't say it's the same one you were shown before?

A Yes. But it's the same format.

Q And at the time you were shown the photo spread containing six pictures by another officer, did you at that time pick out a person that you believed to be the one you saw on January 7?

A I did.

Q And what, if any, statement did you make concerning the identification to the detective who showed you that photo spread?

A That I felt the picture I had identified was the person I'd seen and chased.

Q I'm sorry, you felt that what?

Appendix 4

(to motion for evidentiary hearing)

A I did.

Q Did he ask any questions about that photograph?

A He asked me if that photograph was the individual who had burglarized my home.

Q Did you make a response to that question?

A Yes. I indicated that it appeared to be.

Q It appeared to be what?

A The defendant.

Q I'm sorry, you said it appeared to be what?

A I said the photograph appeared to be that of the defendant.

Q Okay. Well, at that time there would not have been a defendant. Who did you indicate that was a photograph of?

A I indicated it appeared to be a photograph of the individual who had burglarized my home.

MS. BYRNE: Your Honor, may we approach the bench for a moment on a matter of the picture?

THE COURT: Yes.

[Bench conference off the record.]

MS. BYRNE: If I may have a moment, your Honor. I seem to have misplaced an item of evidence that the next question would be concerning. If the Court was planning to take a break for the benefit of the reporter, I wonder if I could request it be now so I could trot back across

the street and see if I may have left it on my desk.

THE COURT: Well, it's a little bit early. The photograph that you have asked him about?

MS. BYRNE: There's another one.

THE COURT: Well, is there any reason why we can't proceed to the next series of questions, then come back to that? It's at least clear in my mind.

MS. BYRNE: We can.

THE COURT: If we come back in an hour with the picture I, at least, would remember Mr. Spielmans' testimony that he just gave, and I can't assume anything less on the part of the jury.

MS. BYRNE: I'm sorry, your Honor.

THE COURT: I'm sure the jury will figure it out. I just don't want to take a break now.

MS. BYRNE: When was the Court planning on taking the break?

THE COURT: Probably about quarter to 3:00. If you finish before then, we can always come back. I'm sure the jury is going to understand, even though it may be out of order a little bit.

MS. BYRNE: That's fine.

Q After the occasion when you looked at this one picture, were you then shown further pictures after that?

A Yes. Sometime later. I believe it was a week

home was burglarized, if you were to see the person that you saw jumping over the fence at the side of your house again, would you be able to recognize that person?

A I would.

Q And is that person in the courtroom today?

A Yes, he is.

Q And would you point him out for the jury, please?

A Gentleman in the ski sweater, the defendants table.

MS. BYRNE: May the record reflect that he has identified the defendant, Mr. Greg Oliver?

MR. McCAUGHEY: No objection.

THE COURT: The record will so reflect.

MR. McCAUGHEY: And to the best of your recollection is that person that you just identified present at the lineup that you observed?

A Yes.

Q And is that person you picked out in the lineup?

A It is.

Q And in the photo spread of six individuals that you observed, was the person's picture in that photo lineup?

A It was.

Q And is that the same person you have picked out in the photo lineup?

A It is.

MS. BYRNE: Your Honor, the State has no further questions.

THE COURT: Why don't we take a break now, then you can run and --

MS. BYRNE: I was, subject to that.

THE COURT: Members of the jury, we are going to take a break at this time. During which time Mrs. Byrne will get the pictures she needs. Remember the admonition of the Court is to not discuss this matter with anyone, including among yourselves, do not form or express any opinions or conclusions. And is ten minutes enough, Mrs. Byrne?

MS. BYRNE: I hope so, your Honor.

THE COURT: All right. We'll try to keep this break to ten minutes if we can. See you then.

[Whereupon, the jury exited the courtroom.]

THE COURT: Do you have any jury instructions for me?

MS. BYRNE: I do.

THE COURT: Anything else we need to address? If not, we'll be in recess.

---Recess---

THE COURT: Go ahead, Ms. Byrne.

MS. BYRNE: Your Honor, Mr. Warner, who I indicated earlier is an investigator with our office, is

here now. I would like to have him with me, if for no other reason, in case I misplace something else during at least the afternoon proceedings. I have discussed it with Mr. McCaughey and he has no objection.

MR. McCAUGHEY: That's correct, your Honor.

THE COURT: All right. Members of the jury, Mr. Warner will be an exception to the exclusionary rule. There is an exception to that, and that is for a witness who is present is necessary to aid counsel in the presentation of the case. Mr. Warner appears to fit that exception, and Mr. McCaughey has agreed that he can stay, so he will be with us.

Go ahead,

MS. BYRNE: Thank you, your Honor.

Q Mr. Spielmans, showing you what's been marked as State's Exhibit 15 for identification, do you recognize that? You may want to look on both sides.

A This appears to be the photo spread that I was shown at the sheriff's office.

Q Okay. And that would have been when?

A Somewhat more than a week after the event, I believe. I don't recall the exact date.

MS. BYRNE: State would move to have what has been marked as State's Exhibit 15 introduced into evidence.

MR. McCAUGHEY: No objection.

APPENDIX 3

TESTIMONY CONCERNING VALUE OF PROPERTY

for the dial tone to show up in it. I attempted to dial but I couldn't get a dial tone, so about the time I was in my driveway once again, I called 911 again.

Q And did you reach them?

A Yes.

Q Were you able to give them any additional information?

A Yes. I gave them a description of the vehicle, its license number and its direction of travel.

Q Okay. And did some member of the sheriff's office arrive to take your report from you?

A Yes.

Q And did you give that person the same description as you have talked about just now?

A Yes.

Q And did you have an opportunity, either then or later, to check further in your house?

A Yes. When the deputy arrived, he asked me if I was missing any property, and I was able to identify some items for him.

Q What items did you tell him were missing?

A A watch, a ring, four $1 bills. I believe that was it.

Q I'm sorry?

A I believe that's all.

Q And did you place a value on that watch at that

time?

A Yes. I believe I did.

Q Do you recall what it was?

MR. McCAUGHEY: Your Honor, I object at this time. I think the value we're talking about is the value he testifies to today, not what he told the police officer.

THE COURT: Sustained.

Q (By Ms. Byrne) Speaking at the present time, do you have an opinion as to the value of that watch?

A I secured opinion from a jeweler in regard to the watch, and he indicated probably --

MR. McCAUGHEY: Objection. Hearsay.

MS. BYRNE: Well, do you have an opinion as to what the value of that watch is?

THE WITNESS: Yes. I indicated --

MR. McCAUGHEY: May I voir dire at this point?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. McCAUGHEY:

Q Mr. Spielmans, this opinion you're about to give us is based on the value that you received from that jeweler?

A Yes.

MR. McCAUGHEY: I would object, your Honor.

I think it's based on hearsay.

MS. BYRNE: Could we clarify that as the value received from the jeweler on the value that the jeweler placed on the watch? I'm just not clear about what you're question was, Counsel.

THE COURT: I don't think he's suggesting that it was sold.

MR. McCAUGHEY: No.

MS. BYRNE: Excuse me?

THE COURT: I interpret the answer to be that he sold the watch to the jeweler and therefore are thereby determined value.

MR. McCAUGHEY: You're just basing your testimony here on what the jeweler told you the watch was worth?

THE WITNESS: Yes, and from my insurance agent, the best way to determine the value of the property.

MR. McCAUGHEY: I don't care what your insurance agent told you. That was the end of my question. I renew my objection.

THE COURT: Mrs. Byrne, do you want to address the objection?

MS. BYRNE: Well, your Honor, may I further question the witness to establish one other matter?

THE COURT: Sure.

Q (By Ms. Byrne) All right. Did you have an

opinion as to what the value of the watch was before you consulted with a jeweler?

A I did.

Q When you consulted with the jeweler, did that change your opinion as to the value of the watch?

A Yes.

MS. BYRNE: Well, your Honor, having received the answer to those questions, I think what Mr. Spielmans will tell us is how he valued the watch after adding to his own information from consulting with a person whose business is to establish value.

MR. McCAUGHEY: Which is precisely what we don't know.

THE COURT: Well, the ruling of the Court will be that he's not entitled to testify as to the valuation given by someone other then him. He, however, is entitled to testify of his view of what his property is worth, unaffected by anything he heard from the jeweler or anyone else, which, I guess, makes relevant what he believed it was worth close to the time of the incident but before he consulted with a jeweler.

So I guess I'm referring to, based on the testimor and the earlier ruling I made about whether or not he could testify as to what he indicated to a police officer, its value. Maybe the only problem is the question needs to

be recharacterized, and that is before he consulted with the jeweler, what was his estimate of the value of his property.

MS. BYRNE: All right.

THE COURT: So the objection, I guess, then, must be sustained.

MS. BYRNE: Thank you, your Honor.

Q At the present time do you have an opinion as to the value of that watch?

MR. McCAUGHEY: Well, your Honor, that's just exactly what we're talking about now. He's going to give his opinion based on --

THE COURT: He has testimony that his present opinion is affected by, if not the same as what the jeweler said.

MS. BYRNE: I don't believe he's -- I didn't ask him what the jeweler told him it was worth. I'm asking what his opinion at the present time is as to the value.

THE COURT: But it's a foundational problem, is that the only way, since he has indicated that his present view of value is affected by what the jeweler told him, he can only testify if he's an expert, and he's the type of expert that reasonably relies upon a jeweler. He's not an expert but he can testify as to his belief as to the value of his own property. And he can do so in order to

avoid the foundational problems by stating what that belief was before he consulted the jeweler.

MS. BYRNE: Well, I'm sure he could testify to that, your Honor, but at the time time he can testify as to what his present belief is, too, whatever it may be based on, because whatever it is based on, we don't know what it was based on previously. At the same time that --

THE COURT: As I understand the Supreme Court ruling, it doesn't matter what an owner of the property's belief of value is based on. An owner of property can testify as to its value. But if it's based on something other than being an owner, such as an owner who consulted with a jeweler, it lacks foundation.

MS. BYRNE: But if it's -- it would still be his opinion, which is what the Supreme Court has said he can testify to, wouldn't it, your Honor?

THE COURT: Well, I'm going to sustain the objection.

MS. BYRNE: Thank you.

Q (By Ms. Byrne) All right. At the time of the theft, did you have an opinion as to the value of that watch?

A Yes, I did.

Q And what was your opinion as to its value?

A I believe it was $125.

Q And I believe you indicated a ring was taken?

A Yes.

Q And at the time that the ring was taken, did you have an opinion as to the value of that ring?

A I did have, and whatever that opinion was is reflected in the police report. I don't recall.

Q You do not recall?

A No.

Q Is there anything that would help refresh your recollection?

A Nothing other than the police report, I believe.

MR. McCAUGHEY: $100.

MS. BYRNE: Pardon me?

MR. McCAUGHEY: $100 was the watch and the ring.

MS. BYRNE: May I approach the witness, your Honor?

THE COURT: You may.

MS. BYRNE: If you would care to review that for a moment and see if that refreshes your recollection.

THE WITNESS: You mean the figure on the ring?

MS. BYRNE: Just a second. I'm sorry, what?

THE WITNESS: I'm -- Let me ask you if I understand.

Q (By Ms. Byrne) I'm asking you if looking at the police report refreshes your recollection as to the ring.

MR. McCAUGHEY: As to the ring?

MS. BYRNE: As to the ring. Thank you.

THE WITNESS: I'm sure it reflects what I said. I just don't recall.

Q (By Ms. Byrne) Well, does looking at that report refresh your recollection as to how you valued the ring at that time?

A Oh. I don't know how I valued it. I didn't purchase it.

Q I understand that, but that's not the question. The question is: Having looked at this report, this police report, does that refresh your recollection as to how you valued the ring at that time?

A Yes.

Q Okay. What was the value you placed on that ring at that time?

A I really can't recall. It states $200 on there. That's what I said. If it says $200 on there, that's what I said.

Q I believe you also indicated there were four $1 bills.

A That's correct.

Q Where were those items kept?

A They were on top of a dresser in my bedroom.

Q And did you observe any other damage to your house?

MR. McCAUGHEY: That's all.

REDIRECT EXAMINATION

BY MS. BYRNE:

Q I just have one other question. Mr. Spielmans, you indicated that when you talked to the officer about your losses as a result of this burglary, you indicated a ring and watch and four $1 bills. I thought, on cross-examination, I heard you mention some additional small items. Was there anything else missing besides the ring and watch and dollars?

A Yes. Sometime later, after I filled out my claim, there were four or five gold dollars, Canadian coins I discovered were no longer there.

Q And what was the value of those?

A Oh, very little. About 75 cents each.

MS. BYRNE: Thank you. I have nothing further.

THE COURT: Anything further, Mr. McCaughey?

MR. McCAUGHEY: Nothing further, your Honor.

THE COURT: I'm assuming, Mr. McCaughey, you want Mr. Spielmans available, if necessary for your case?

MR. McCAUGHEY: That would be fine.

THE COURT: All right. And can we just arrange, through Mrs. Byrne, if you need him, she could get ahold of him for you?

SALT LAKE CITY, UTAH; WEDNESDAY, SEPTEMBER 6, 1989

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THE COURT: The record should indicate that the defendant is present with his counsel.

Mrs. Byrne is present on behalf of the State, the jury is not present.

Mrs. Byrne, it's my understanding that you intend to rest.

MS. BYRNE: That's correct, your Honor.

THE COURT: All right. Then we'll deem you technically rested and at this time, when the jury comes back, if they come back, you should formally rest in front of them on the record.

MS. BYRNE: All right.

THE COURT: Mr. McCaughey?

MR. McCAUGHEY: I have a motion to dismiss as to -- I guess it's a motion to dismiss the felony theft, and reduce it to a Class A misdemeanor, and that's based on Mr. Spielmans' value testimony.

THE COURT: I have totaled it up to $335.

MR. McCAUGHEY: My recollection is he testified that watch was worth $125. He never testified as to any value on the ring. He testified that he looked at the police report, testified that did not refresh his recollection, that it says that he testified what the police report

indicated. I said $200, but I don't remember saying that, and he never ever testified as to, in his opinion, as to the value of that ring. I think he has to do that. So I think we have $125.

THE COURT: Well, let me just indicate this, that I agree that at best, from your client's perspective, his testimony was a bit garbled. However, I believe that his testimony on refreshing his recollection, although he did not use the magic words that refresh your recollection, that he did confirm that that refreshed his view of the value at the time, the $200. And I was listening to that testimony closely as it came in, and it was right at the end of that submatter that he finally kind of stumbled into it. And therefore, the motion will be denied.

I think the question goes to the weight, and you're certainly able to challenge that in closing argument.

Do you want to put anything on the record about this witness?

MS. BYRNE: Yes, your Honor. I would. State has intended and has subpoenaed one additional witness, a Mrs. Tina Lehman, on the previous occasion when trial was set back in early July.

THE COURT: After the first continuance and before the second?

MS. BYRNE: I could tell you --